have evolved a doctrine of the "theory of the pleading" best stated as follows: "It is an established rule of pleading that a complaint must proceed upon some definite theory; and on that theory the plaintiff must succeed or not succeed at all. A complaint cannot be made elastic so as to take form with the varying views of counsel." [7] The application of this rule prevents not only a change from a legal to an equitable theory or *vice versâ*, but also, in some jurisdictions, a change of theory at law or in equity.[8] This doctrine is firmly established in Indiana [9] and Missouri,[10] but in many other jurisdictions the decisions are hopelessly confused.[11]

Logically, if the plaintiff has set forth facts in his complaint constituting a cause of action and entitling him to some relief legal or equitable, his action should not be dismissed because he has misconceived the nature of his remedial right.[12] And the decisions are tending strongly to that view, Wisconsin, especially, having abandoned its former position.[13] In a recent case the court permitted amendment of a complaint setting forth a cause of action for negligence so as to allow recovery under a statute. *Birt* v. *Southern R. Co.*, 69 S. E. 233 (S. C.). The argument advanced by advocates of the doctrine is based on the danger of surprise to the defense, but clearly no undue burden is imposed upon a party by compelling him to come into court prepared to defend on any possible legal view of the facts. On the other hand, it is the height of technicality to compel one, admittedly entitled to some relief, to begin his proceedings anew because of the failure of his counsel to select the proper theory.[14] The chief purpose of the pleadings is to notify the parties of the claims or defenses which will be advanced by their opponents, and that result being accomplished by a complete statement of the facts, they should not afford a means of escape from just liability.[15] The practicability of the rule contended for is shown by its success in the jurisdictions adopting it, and also by the satisfaction with the practice in some states whereby claims against decedents' estates are litigated with no other pleadings than an informal statement of claim in which no attempt is made to set forth a cause of action.

GIFTS INTER VIVOS OF CHOSES IN ACTION REPRESENTED BY A SPECIALTY. — Although in Coke's time a donee of a chose in action ac-

[7] Mescall *v.* Tully, 91 Ind. 96, 99.

[8] The theory of a case does not involve the amount of relief. Hence there is no departure from the theory when one obtains less relief than was asked for, Yorn *v.* Bracken, 153 Ind. 492; nor is it necessarily a departure when the relief to which one is entitled differs slightly from that asked, Matthias *v.* Warrington, 89 Va. 533.

[9] Oölitic Stone Co. *v.* Ridge, 83 N. E. 246, 247 (Ind.).

[10] Huston *v.* Tyler, 140 Mo. 252.

[11] See 8 Col. L. Rev. 523, 532, 533 and cases cited.

[12] White *v.* Lyons, 42 Cal. 279, 282. See Manning *v.* School District, 124 Wis. 84, 91.

[13] Manning *v.* School District, *supra;* Bieri *v.* Fonger, 139 Wis. 150; Bannen *v.* Kindling, 142 Wis. 613, overruling Supervisors *v.* Decker, 30 Wis. 624; Grimes *v.* Greenblatt, 47 Colo. 495; Cockrell *v.* Henderson, 81 Kan. 335; Crowder *v.* Fordyce Lumber Co., 93 Ark. 392; Bates *v.* Capital State Bank, 18 Idaho, 429. *Contra*, Jones *v.* Winsor, 22 S. D. 480.

[14] See Bieri *v.* Fonger, *supra.*

[15] See 4 Ill. L. Rev., 491, 494.

quired no right against the obligor,[1] it is now well settled that a gift of an obligation can be made. The law as to the methods of making a gift of a chose in action evidenced by a specialty is, however, in a confused condition. Most welcome, therefore, is the opinion of Parkhurst, J., in the recent case of *Talbot* v. *Talbot*, 78 Atl. 535 (R. I.), which explains the theory of some of the mooted transactions more adequately than has been done by any court heretofore.

The first requisite of a valid gift of a contract right is, of course, the intention of the owner to make a present gift.[2] Although by the anomalous doctrine of *Ex parte Pye*[3] a valid trust of a chose in action may be created by the owner's merely declaring himself trustee, this transaction requires an intention to create a trust, and the courts have firmly refused to find such an intention merely because an intended gift did not take effect.[4] The second requisite of a gift is some act regarded by the law as a valid execution of the intent. What acts are sufficient?

When a chose in action is represented by a written instrument, the obligee is possessed of two things, — the piece of paper and the right to sue the obligor. Some kinds of instruments, such as negotiable bills or notes, life insurance policies and certificates of stock, are by mercantile custom or express provision in the instrument itself transferable by indorsement and delivery. But as all such instruments are chattels, the usual methods of transferring other personal property[5] should also be sufficient to pass the paper; and as these instruments are muniments of title,[6] the right to the obligation should go with the instrument itself. If the instrument itself, or a deed of it, is delivered, together with an express power to collect, the donee acquires an interest which ought to make the power irrevocable. Even if no express power is given, one should be implied; for the donor would not have parted with his muniment of title had he intended to reserve to himself the right to collect, and, furthermore, he cannot force the donee to return the instrument.[7] Moreover, even if the transfer is one which is required to be made on the books of the obligor, as is often the rule as to stock and to savings-

[1] See 1 HARV. L. REV. 6, n. 2.

[2] Talbot *v.* Talbot, *supra;* Coolidge *v.* Knight, 194 Mass. 546.

[3] 18 Ves. 140. *Accord, Re* Shield, 53 L. T. R. N. S. 5, 8; Matter of Totten, 179 N. Y. 112.

[4] *Re* Shield, *supra;* Paine *v.* Paine, 28 R. I. 307; Norway Savings Bank *v.* Merriam, 88 Me. 146.

[5] A gift of a chattel can be made by delivery of the chattel, or a deed of it, but not by parol or a writing not under seal. See Cochrane *v.* Moore, 25 Q. B. D. 57.

[6] For a list of instruments which are, and which are not, muniments of title, see ROOD, WILLS, §§ 28, 29.

[7] The opinion in Talbot *v.* Talbot, *supra* (certificates of stock), covers all of these points, either by actual decision or *dicta*. But authority against almost every one of them can be found in the books. For a summary of the authorities, see AMES, CASES ON TRUSTS, 2 ed., 136–163, and notes, See also 5 HARV. L. REV. 35; 9 *id.* 488; 12 *id.* 498 (cited with approval in Talbot *v.* Talbot, *supra*, 547); 22 *id.* 453. That the diversity still exists is shown by an examination of the recent cases. See, for example, Allen-West Commission Co. *v.* Grumbles, 129 Fed. 287 (deed of stock certificate ineffective); Malone's Committee *v.* Lebus, 116 Ky. 975 (deed of note effective); Wilson *v.* Featherston, 122 N. C. 747 (delivery of savings-bank book ineffective); Polley *v.* Hicks, 58 Oh. St. 218 (delivery of savings-bank book effective). It has even been held that a writing without a seal purporting to pass a bond is an effective gift *inter vivos*. McGavic *v.* Cossum, 72 N. Y. App. Div. 35. But there seems to be no proper ground for such a decision.

bank accounts, the same result should be reached. Otherwise, in the words of Dean Ames, "We should have this extraordinary condition of things: the donee unable to transfer the shares or collect the deposit, because the gift is not deemed complete; the donor equally helpless, because he cannot produce the certificate or bank-book; the company or bank, on the other hand, in a position capriciously to recognize either the donor or donee as *dominus* of the claim, or, indeed, unless they come to some compromise, to refuse with safety to recognize either." [8] It is generally said that such an unregistered transfer of stock passes only an equitable title; [9] and some cases have held that an attaching creditor of the transferor should prevail against the transferee.[10] But, with submission, both of these views are wrong; and, while the corporation is justified in refusing to recognize the donee as stockholder until he asks for registration, he has nevertheless acquired a legal right to the stock.[11]

APPOINTMENT OF EXPERT WITNESSES BY THE COURT. — With increasing specialization in industry and science and the consequently increasing importance of expert opinion evidence, there has grown up much dissatisfaction with the old method, whereby each side calls its own expert witnesses, who are apt, consciously or unconsciously, to become partisans of the side employing them. About the mildest possible reform that promises any substantial improvement in those conditions was embodied in a Michigan statute recently held unconstitutional. *People* v. *Dickerson*, 129 N. W. 198 (Mich.). That statute provided for appointment by the court of not more than three suitable disinterested persons to investigate issues involving expert knowledge or opinion in homicide cases, and testify at the trial. It did not preclude either prosecution or defense from using other expert witnesses.

Due process of law,[1] which the court thought infringed, does not require a cast-iron adherence to the old forms of procedure.[2] It does not require that the judge refrain from expressing to the jury an opinion as to the credibility of particular witnesses although that is the practice in most states.[3] Federal courts and some state courts still follow the old common-law practice of charging on the facts as well as the law.[4] Neither does due process preclude the prosecution from calling witnesses whose names are not indorsed on the indictment or contained in the list given to the defendant.[5] However, it would be well for the legislature to provide for

[8] See AMES, CASES ON TRUSTS, 2 ed., 156, n. (cited with approval, Talbot *v.* Talbot, *supra*, 547).

[9] See Talbot *v.* Talbot, *supra*, 546; Basket *v.* Hassell, 107 U. S. 602, 614; 4 THOMPSON, CORPORATIONS, 2 ed., § 4318.

[10] Application of Murphy, 51 Wis. 519. *Contra*, Reilly *v.* Absecon Land Co., 75 N. J. Eq. 71.

[11] See Parker *v.* Bethel Hotel Co., 96 Tenn. 252, 284; 1 MORAWETZ, PRIVATE CORPORATIONS, 2 ed., §§ 193–200; 16 HARV. L. REV. 312.

[1] MICH. CONST., Art. II, Sec. 16; U. S. CONST., Amendment XIV.

[2] Hurtado *v.* California, 110 U. S. 516; Brown *v.* New Jersey, 175 U. S. 172.

[3] Dakota *v.* O'Hare, 1 N. D. 30; People *v.* O'Brien, 96 Cal. 171.

[4] Simmons *v.* U. S., 142 U. S. 148; McClain *v.* Commonwealth, 110 Pa. St. 263.

[5] People *v.* Machen, 101 Mich. 400; State *v.* Hollingsworth, 100 N. C. 535.